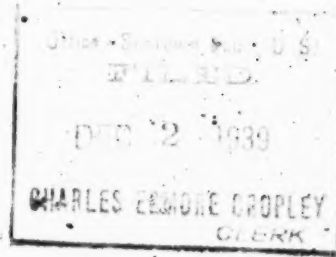


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No. 239

In the Supreme Court of the United States

October Term, 1939.

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY.

BRIEF OF PETITIONER.

✓ **CLAUDE H. ROSENSTEIN,**
Counsel for Petitioner.

**HUNT & EAGLETON,
HORACE D. BALLAJNE,**
Of Counsel.

INDEX.

	PAGE
Reference to official report of opinion delivered in the court below	1
Statement of the ground on which the jurisdiction of the Supreme Court of the United States is involved.	1
Statement of the case	3
Assignments of error	7
Argument	9
Property fraudulently conveyed to an assignee for benefit of creditors is subject to attachment as the property of the debtor	10
The right given to a creditor by state law to have a fraudulent conveyance set aside is withdrawn from him by the Bankruptcy Act only upon the election of the trustee in bankruptcy to assert the rights of the creditors	10
Only the trustee in bankruptcy, and not the debtor or a prior purchaser of the property involved, may assert the voidance of a proceedings or the discharge of a lien under the provisions of Sec. 67f of the Bankruptcy Act	11
Orders made in subsidiary proceedings in bankruptcy are not <i>res adjudicata</i> on persons not party thereto	13
Conclusion	13

TABLE OF CASES.

Coker v. Utter, (Ga.) 108 S. E. 538	12
Connell v. Walker, 291 U. S. 1, 78 L. ed. 613	11, 12
Dickens v. Breedlove, (Ga.) 129 S. E. 886	12
First State Bank of Dawson v. Bradshaw, 174 Okl. 268, 51 P. (2d) 514	10
Equitable Credit Co. v. Miller, (Ga.) 137 S. E. 771	12
Frazee v. Nelson, (Mass.) 61 N. E. 40	12

TABLE OF CASES—CONTINUED.

PAGE

Gratiot County State Bank v. Johnson, 249 U. S. 246, 63 L. ed. 247	13
Hutchins v. Cantu, (Tex. Civ. App.) 66 S. W. 138.....	12
Jones v. Springer, 226 U. S. 148, 57 L. ed. 161.....	11
Kobrin v. Drazin, (N. J.) 128 Atl. 796.....	12
Martin v. Greenlake State Bank, (Minn.) 208 N. W. 21..	12
McKenney v. Cheney, (Ga.) 45 S. E. 433.....	12
Miller v. Equitable Credit Co., (Ga.) 138 S. E. 282....	12
Neugent Garment Co. v. U. S. F. & G., (Wis.) 231 N. W. 600.....	12
Pauline Oil & Gas Co. v. Fischer, 90 P. (2d) 411.....	1
Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128.....	11
Pigg & Son v. United States, (C. C. 10th) 81 F. (2d) 334.	12
Straton v. New, 283 U. S. 318, 75 L. ed. 1060.....	11
Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770.....	11, 12, 13
Walker v. Connell, (N. Dak.) 249 N. W. 726.....	12
Wells v. Guaranty State Bank, 56 Okl. 688, 156 Pac. 896	10

TEXT BOOKS.

6 Am. Jur. 698	31
8 C. J. S. 910	13

STATUTES.

Bankruptcy Act, Sec. 67f (11 U. S. C. A., Sec. 107, as amended)	1, 2
Judicial Code, Sec. 237, as amended (U. S. C. A., title 28, Sec. 344)	2
30 Stat. 564, c. 541, Sec. 67	1
32 Stat. 800, c. 487, Sec. 16	1
36 Stat. 842, c. 412, Sec. 12	1
48 Stat. 924, c. 424, Sec. 5	1

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1939.

No. 239

ABE FISCHER, Petitioner,

vs.

PAULINE OIL & GAS COMPANY.

BRIEF of PETITIONER.

**Reference to Official Report of Opinion Delivered in the
Court Below.**

This cause has not yet been officially reported but appears as *Pauline Oil & Gas Co. v. Fischer*, 90 P. (2d) 411.

**Statement of the Ground on Which the Jurisdiction of the
Supreme Court of the United States Is Involved.**

The Supreme Court of Oklahoma determined this cause adversely to the rights of Abe Fischer by its interpretation of section 67f of the Bankruptcy Act (chapter 541, section 67, 30 Stat. 564; as amended chapter 487, section 16, 32 Stat. 800; chapter 412, section 12, 36 Stat. 842; chapter 424, section 5, 48 Stat. 924) (U. S. C. A., title 11, section 107 as amended). Petitioner contends that the Supreme Court of Oklahoma misinterpreted this statute, and by this misinterpretation of the federal statute which was in effect prior to January 31, 1938, was deprived of his title to a certain oil and gas lease.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States are subdivisions b and c of section 237 of the Judicial Code as amended (U. S. C. A., title 28, section 344), the pertinent provision of which is:

"It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States * * *."

The basic federal statute involved is section 67f of the Bankruptcy Act as amended. It reads as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, and any bond which may be given to dissolve any such lien so created, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, and any non-exempt property of his which he shall have deposited or pledged as security for such bond or to indemnify any surety thereon, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect:

Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Petition for appeal to the Supreme Court of the United States was presented to and allowed by the Chief Justice of the Supreme Court of Oklahoma on the 30th day of June, 1939. This court on October 9, 1939, dismissed the appeal but granted *certiorari* under the provisions of section 237c, Judicial Code as amended (43 Stat. 936, 938).

Statement of the Case.

The facts of this case so far as are pertinent here are simple and undisputed. The Supreme Court of Oklahoma by its interpretation of the provisions of section 67f of the Bankruptcy Act determined that Abe Fischer had been by the bankruptcy proceedings of the Geraldine Oil Company foreclosed of any right which would permit him to attack the purported title of the Pauline Oil & Gas Company to the oil and gas lease involved.

In August, 1934, Sam Rainbolt obtained an award for compensation from the Geraldine Oil Company before the Industrial Commission of the State of Oklahoma. In October, 1934, the Geraldine Oil Company made an assignment of assets, including the lease in question, for benefit of creditors. In January, 1935, sale was made by the assignee for benefit of creditors to the Pauline Oil & Gas Company for the sum of \$2500.00. In September, 1935, Sam Rainbolt, contending that the alleged assignment for benefit of creditors and the proceedings thereunder were fraudulent and void, issued an execution against the assets and property of the Geraldine Oil Company, and the Sheriff of Pawnee County on September 17, 1935, levied upon the lease in question

and advertised the same for sale for November 12, 1935. On November 12, 1935, the property was sold by the sheriff pursuant to the execution and levy aforesaid to Abe Fischer, the petitioner. On October 24, 1935, some few days before the sheriff's sale as above set out, the Geraldine Oil Company, upon its voluntary petition, was adjudged bankrupt in the United States District Court.

On the 4th day of June, 1936, the referee in bankruptcy upon the application of the Pauline Oil & Gas Company in a summary proceeding purported to confirm the assignment made by the assignee for benefit of creditors to the Pauline Oil & Gas Company which had been made in January, 1935.

Thereafter in August, 1936, Abe Fischer commenced his suit in the District Court of Pawnee County against the Pauline Oil & Gas Company in ejectment and to quiet title to the lease involved and for damages for wrongful detention, basing his right upon the sheriff's deed which he had obtained. The Pauline Oil & Gas Company by its answer alleged that the sheriff's deed was void because of the bankruptcy proceedings and alleged that it had title because of the sale to it from the assignee for benefit of creditors and the order of the referee in bankruptcy confirming said sale. Fischer by reply set up that Rainbolt had a statutory lien on the premises even prior to the assignment for benefit of creditors, that the assignment for benefit of creditors and the proceedings thereunder were fraught with fraud and that the bankruptcy proceedings and the orders entered therein did not destroy his title under the sheriff's sale. Upon trial of the issues so made up the trial court directed a verdict in favor of Fischer, holding that Sam Rainbolt had a statutory lien which prevailed over the assignment for benefit of creditors' proceedings and the bankruptcy proceedings. On appeal the Supreme Court of Oklahoma held that Rainbolt did not have such a lien and that under the

provision of section 67f of the Bankruptcy Act the adjudication of bankruptcy voided the levy and lien of the Rainbolt execution, and that Fischer, the purchaser at said execution sale, acquired no title or interest upon which to predicate his suit or claim of fraud which would vitiate the title of the Pauline Oil & Gas Company.

That court in the opinion applied section 67f of the Bankruptcy Act and held that Fischer had no interest in the oil and gas lease in the following language:

"Then it would follow that no lien attached until execution was issued and levied on this property. That occurred in September, 1935. But the former owner and execution debtor became a bankrupt in October, 1935, and the lien by levy was nullified by the provision of the Bankruptcy Act above cited. The effect of that act is succinctly stated in Remington on Bankruptcy, Vol. 4, p. 682, Sec. 1957, as follows:

'All liens obtained by legal proceedings upon property of the bankrupt within four months preceding the filing of the bankruptcy petition and when he is insolvent, are nullified by the adjudication in bankruptcy.'

"The former owner of this property was insolvent, and had been since October, 1934, when the assignment for creditors was made, and was in due course adjudged a bankrupt. Then the sheriff's sale subsequently made conveyed no title to plaintiff, and he had no title and had no right to prevail in the trial court.

"This is true, even if defendant did not acquire any title to the property by purchase from the trustee in January, 1935. It is therefore not necessary that we determine the validity of that trustee sale to pass title."

So far as the questions brought to this Court are concerned, our contention in the appellate court was that section 67f of the Bankruptcy Act did not operate to make void the lien of levy of Sam Rainbolt even though acquired

within four months of the adjudication of bankruptcy because at and subsequent to the time the petition in bankruptcy was filed, the lease was neither in the actual nor constructive possession of the Geraldine Oil Company and was not in the actual or constructive possession of the trustee in bankruptcy; that the trustee in bankruptcy at no time had this lease in his possession nor did he attempt to obtain possession thereof but he in fact and in substance disclaimed title in and to this lease by electing to take the proceeds from the assignee for the benefit of creditors' sale to the Pauline Oil & Gas Company; and that the order of the referee in bankruptcy purporting to confirm the sale made by the assignee for benefit of creditors to the Pauline Oil & Gas Company was without force and void to bind Fischer, who was not a party thereto because it was made in a summary proceedings without notice to Abe Fischer and the property was neither in the actual nor constructive possession of the trustee.

(Petition and Exhibits, R. 2-7; Answer and Cross Petition and Exhibits, R. 8-17; Reply to Answer and Answer to Cross Petition, R. 17-20; Amendment to Answer and Answer to Cross Petition, R. 20; Opinion of the Supreme Court of Oklahoma, R. 37-44.)

ASSIGNMENTS of ERROR.

The following assignments of error were made by petitioner when his petition for appeal was filed and will be urged in this court:

1. The Supreme Court of Oklahoma erred in holding that section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) voids a levy obtained within four months of bankruptcy on a piece of property under a general execution issued against the judgment debtor when: *a*, The title of the property is held by a third person; *b*, the property at the time of the levy was not in the possession of the bankrupt; *c*, the property levied upon is neither actually nor constructively in the possession of the bankrupt or the trustee in bankruptcy.

2. The Supreme Court of Oklahoma erred in holding that section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) avoids a levy obtained within four months of bankruptcy upon a property under a general execution issued against the debtor, who later was adjudicated a bankrupt, when the property levied upon was neither actually nor constructively in the possession of the bankrupt.

3. The Supreme Court of Oklahoma erred in holding that under the provision of section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) the levy of a general execution issued against the Geraldine Oil Company on an oil and gas lease, title and possession of which was in the Pauline Oil & Gas Company, which company had purchased it from the assignee for benefit of creditors of the Geraldine Oil Company, was voided by the adjudication of bankruptcy against the Geraldine Oil Company within four months after the execution levy was made and thus fore-

closing Fischer, the purchaser at the sheriff's sale, from establishing, in a suit between Fischer and the Pauline Oil & Gas Company, the fraud inhering in the proceedings of the assignment for benefit of creditors and bankruptcy in support of his title to the said oil and gas lease.

4. The Supreme Court of Oklahoma erred in holding in effect that the referee in bankruptcy had jurisdiction in a summary proceeding to determine title to the property herein questioned when possession of the property was neither actually nor constructively in either the trustee in bankruptcy or the bankrupt.

5. The Supreme Court of Oklahoma erred in holding that section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) operated to avoid a lien of levy acquired within four months of the adjudication upon property which the trustee neither took possession of nor administered.

6. The Supreme Court of Oklahoma erred in holding that the Pauline Oil & Gas Company, which did not take title from or through the trustee in bankruptcy of the Geraldine Oil Company, could avail itself of the benefits of the provision of section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) and thus defend its purported title obtained long prior to the bankruptcy proceedings against Fischer who purchased the property at an execution sale, which execution was levied upon the oil and gas lease involved within four months of the adjudication of bankruptcy of the judgment debtor, the Geraldine Oil Company.

ARGUMENT.

The Supreme Court of Oklahoma by its interpretation and application of the provisions of the Bankruptcy Act denied Abe Fischer, petitioner his day in court. The petitioner, holding title through an execution sale, which execution was levied within four months of bankruptcy, attacked the adverse title thereto of the Pauline Oil & Gas Company. The trial court directed a verdict in petitioner's favor on the theory that his title came through the foreclosure of a statutory lien. The Supreme Court of Oklahoma determined that there was no statutory lien foreclosed and that the directed verdict was erroneous and refused to give consideration to any of the other theories and contentions of the plaintiff on the ground that the levy of execution made on this lease within four months of the filing of the bankruptcy proceedings was automatically voided by the bankruptcy proceedings and that the proceedings and sale thereunder gave the petitioner no title or interest in and to the property upon which he might rely to quiet title against the title and claim of the Pauline Oil & Gas Company, which petitioner claimed was founded upon assignment made in fraud of creditors.

We submit that the assignment for benefit of creditors, if void as being made in fraud of creditors, being subject to execution as the property of the debtor, Geraldine Oil Company, was brought into the jurisdiction of the District Court of Pawnee County, Oklahoma, by the levy of execution and that the jurisdiction of this District Court of Pawnee County, Oklahoma, was not automatically withdrawn but that said proceedings under the Bankruptcy Act could have been preserved for the benefit of the trustee in bankruptcy, which was not done; that in the absence of action on behalf of the trustee in bankruptcy and the bankruptcy

court to avail itself of the benefits of that proceedings for the benefit of creditors of the Geraldine Oil Company, the proceedings in that court and the title obtained by the purchaser at the sale under that proceedings are not affected by the bankruptcy proceedings; that the order made by the referee in bankruptcy which purported to ratify and approve the title of the Pauline Oil & Gas Company was ineffective to bind Abe Fischer, who was not a party to that proceedings.

Property fraudulently conveyed to an assignee for benefit of creditors is subject to attachment as the property of the debtor.

Under the law of Oklahoma property conveyed under assignment for benefit of creditors which is void as being in fraud of creditors is subject to attachment as the property of the debtor.

—*Wells v. Guaranty State Bank*, 56 Okl. 688, 156 Pac. 896;

**First State Bank of Dawson v. Bradshaw*, 174 Okl. 268, 51 P. (2d) 514.

*** The right given to a creditor by state law to have a fraudulent conveyance set aside is withdrawn from him by the Bankruptcy Act only upon the election of the trustee in bankruptcy to assert the rights of the creditors.**

In October, 1934, the Geraldine Oil Company made the assignment for the benefit of creditors. The assignee, trustee for the property, made sale thereof to the Pauline Oil & Gas Company January 21, 1935. On September 17, 1935, execution levy was made on this oil and gas lease on judgment against the Geraldine Oil Company. The Geraldine Oil Company was adjudicated a bankrupt on October 24, 1935. The right given to a creditor by the state law to have a fraudulent conveyance set aside is withdrawn from him

by the Bankruptcy Act only upon the election of the trustee in bankruptcy to assert the rights of a creditor. The authority given the trustee to stay a pending suit is not mandatory but permissive to be exercised in the sound discretion of the bankruptcy court.

—*Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613.

Bankruptcy proceedings do not merely by virtue of their maintenance terminate an action already pending in a non-bankruptcy court to which the bankrupt is a party.

—*Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770;

Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128;

Jones v. Springer, 226 U. S. 148, 57 L. ed. 161;

Straton v. New, 283 U. S. 318, 75 L. ed. 1060.

Only the trustee in bankruptcy, and not the debtor or a prior purchaser of the property involved, may assert the avoidance of a proceedings or the discharge of a lien under the provisions of Sec. 67f of the Bankruptcy Act.

In this cause the oil and gas lease was conveyed to the assignee for benefit of creditors in October, 1934, and by him sold and conveyed to the Pauline Oil & Gas Company on January 21, 1935, and the Geraldine Oil Company was not brought into the bankruptcy court until October 24, 1935, more than four months thereafter. The bankruptcy proceedings did not vest the bankruptcy court with jurisdiction of the oil and gas lease involved here.

—*Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770.

The provisions of section 67f of the Bankruptcy Act are for the benefit of the bankrupt's estate and the creditors of the bankrupt. The trustee in bankruptcy is the one who

assembles and preserves the property for the creditors of the bankrupt. He is the one who has the power under the direction of the bankruptcy court to recover property fraudulently assigned and conveyed by the bankrupt prior to bankruptcy. Only the trustee in bankruptcy and those in privity with him may assert the voidance of a proceedings or the discharge of a lien under the provisions of section 67f of the Bankruptcy Act. A sale of realty under execution issued less than four months prior to the time when the execution defendant was declared a bankrupt will not be avoided at the suit of a former grantee of the same property, only the trustee in bankruptcy being entitled to plead the nullity of the execution:

—*Hutchins v. Cantu*, (Texas Civil Appeals) 66 S. W. 138.

To the same general effect are:

Connell v. Walker, 291 U. S. 1, 78 L. ed. 613;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770;

Frazer v. Nelson, (Mass.) 61 N. E. 40;

Equitable Credit Co. v. Miller, (Ga.) 137 S. E. 771;

Miller v. Equitable Credit Co., (Ga.) 138 S. E. 282;

McKenney v. Cheney, (Ga.) 45 S. E. 433;

Martin v. Greenlake State Bank, (Minn.) 208 N. W. 21;

Dickens v. Breedlove, (Ga.) 129 S. E. 886;

Coker v. Utter, (Ga.) 108 S. E. 538;

Neugent Garment Co. v. U. S. F. & G., (Wis.) 231 N. W. 600;

Walker v. Connell, (N. Dak.) 249 N. W. 726 (this cause was appealed in turn to the Supreme Court of the United States in *Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613);

Kobrin v. Drazin, (N. J.) 128 Atl. 796;

Pigg & Son v. United States, (C. C. 10th) 81 F. (2d) 334;

8 C. J. S. 910;
6 Am. Jur. 698.

Orders made in subsidiary proceedings in bankruptcy are not *res adjudicata* on persons not party thereto.

All the world is bound by the adjudication of bankruptcy, but strangers to the proceedings are unaffected by the decisions and orders of that court on subsidiary issues. Fischer was not a party to the bankruptcy proceedings so could not be bound, and his interest could not be adjudicated by the bankruptcy court making an order purporting to confirm the sale made by the assignee for benefit of creditors to the Geraldine Oil Company long prior to bankruptcy.

—*Gratiot County State Bank v. Johnson*, 249 U. S. 246, 63 L. ed. 247;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770.

Conclusion.

We respectfully submit that the Supreme Court of Oklahoma made an erroneous interpretation and application of the provisions of Section 67f of the Bankruptcy Act and that that error should be corrected by this Court and that petitioner be granted his full day in court.

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